LUWASA (MALAYSIA) SDN BHD

v.

ONG SIEW OI

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
TENGKU BAHARUDDIN SHAH JCA
ZALEHA ZAHARI JCA
[CIVIL APPEAL NO: W-02-95-97]
23 JULY 2008

CONTRACT: *Sale and purchase of property - Sale and purchase agreement - Terms and conditions - Delivery of vacant possession - Specific performance - Conditional undertaking - Whether sufficient - Whether terms and conditions in agreement complied with*

LAND LAW: *Sale of land - Sale and purchase of property - Terms and conditions of sale and purchase agreement - Delivery of vacant possession - Specific performance - Conditional undertaking - Whether sufficient - Whether terms and conditions in agreement complied with*

The appellant, the original purchaser of an apartment ('said apartment') from the developer of the master land, subsequently sold the said apartment to the respondent *vide* a sale and purchase agreement ('SPA'). The respondent paid 10% deposit upon execution of the SPA, and the balance purchase price of RM378,000 was payable as provided in cls. 3, 4 and 5 of the SPA. The respondent secured a loan of RM300,000 from one Malayan Banking Bhd, Jinjang Branch ('financier') to finance the purchase. The financier informed the appellant that it would undertake to release the approved loan sum subject to the fulfilment of certain conditions. The appellant, however, failed to comply with the undertaking requested despite repeated reminders. The financier's solicitors then issued to the appellant's solicitors a conditional undertaking from the financier to forward the RM300,000 to the appellant, together with the respondent's cheque for RM78,000 (the difference between the balance of the purchase price and the approved loan) pursuant to cl. 5 of the SPA. The appellant's solicitors rejected the financier's undertaking and contended that cl. 5 of the SPA had not been complied with. The appellant, however, took steps to encash the respondent's cheque of RM78,000. The appellant thereafter issued a notice to the respondent terminating the SPA. The respondent instituted

proceedings against the appellant for an injunction restraining it from selling, transferring or assigning the said apartment to any one other than the respondent, as well as an injunction compelling the appellant to deliver vacant possession of the said apartment to the respondent. The respondent also sought an order for specific performance of the SPA, damages for breach of contract and costs. The High Court judge found that the respondent had fulfilled her part of the bargain before the completion date while the appellant failed to fulfil its, and issued an order for specific performance of the SPA in favour of the respondent. Hence, the present appeal by the appellant.

Held (dismissing the appeal)
Per Zaleha Zahari JCA delivering the judgment of the court:

(1) The appellant had clearly by cl. 5 of the SPA agreed that full payment was deemed to be made upon depositing the differential sum and an undertaking, as opposed to actually receiving the full balance of RM378,000. Payment under cl. 5 was thus a combination of depositing the differential sum and the financier's undertaking and the appellant accepting the differential sum of RM78,000. The appellant had accordingly agreed that, by 24 October 1990, it would receive a partial payment (RM78,000) and a promise to release the loan sum from the financier. The fact that the financier would be issuing an undertaking, instead of issuing the full loan sum directly, implied that there were necessary conditions that had to be met before the loan sum could be released. The trial judge had not erred in taking into account the banking and conveyancing practices adopted by the solicitors relating to transactions such as this. Clause 5 of the SPA clearly stated that the respondent shall "... be deemed to have complied with and satisfied the requirements of cl. 3" (*ie*, effected full payment) when "... the differential sum (*ie*, RM78,000) had been deposited with the vendor's solicitors and the lender or its solicitors have extended an undertaking to the vendor or the vendor's solicitors ...". Clause 5 of the SPA did not state that the lender was to provide an unconditional undertaking, but a lender's undertaking. The judge was therefore right in ruling that the appellant could not read into cl. 5 an "Unconditional Undertaking" and in concluding that a conditional undertaking sufficed and that, in the circumstances of this case, cl. 5 of the SPA had been complied with. (paras 24 & 25)

Bahasa Malaysia *Translation Of Headnotes*

Perayu, pembeli asal sebuah pangsapuri ('pangsapuri tersebut') dari pemaju tanah utama, selepas itu menjual pangsapuri tersebut ke responden melalui suatu perjanjian jual beli ('SPA'). Responden membayar 10% deposit atas pelaksanaan SPA, dan baki harga pembelian sebanyak RM378,000 boleh dibayar seperti yang diperuntukkan dalam kls. 3, 4 dan 5 SPA. Responden berjaya mendapat pinjaman sebanyak RM300,000 dari Malayan Banking Bhd, Jinjang Branch ('pembiaya') untuk membiayai pembelian tersebut. Pembiaya memberitahu perayu bahawa ia akan membuat akujanji untuk melepaskan amaun pinjaman yang diluluskan bergantung kepada penunaian beberapa syarat-syarat. Perayu, walau bagaimanapun, gagal mematuhi akujanji yang diminta sungguhpun diingatkan berulang kali. Peguamcara pembiaya kemudian mengeluarkan terhadap peguamcara perayu sesuatu akujanji bersyarat dari pembiaya untuk menghantar RM300,000 ke perayu, bersama dengan cek responden sebanyak RM78,000 (perbezaan di antara baki harga pembelian dan pinjaman yang diluluskan) mengikut kl. 5 SPA. Peguamcara perayu menolak akujanji pembiaya dan mendakwa bahawa kl. 5 SPA tidak dipatuhi. Perayu, walau bagaimanapun, mengambil langkah menukarkan cek responden sebanyak RM78,000 ke wang tunai. Perayu selepas itu mengeluarkan suatu notis menamatkan SPA kepada responden. Responden mulakan prosiding terhadap perayu untuk mendapat sesuatu injunksi yang menyekatnya dari menjual, memindamilik atau menyerahhak pangsapuri tersebut ke sesiapa selain dari responden, dan juga sesuatu injunksi yang memaksanya untuk menghantar-serah milikan kosong pangsapuri tersebut ke responden. Responden juga menuntut sesuatu perintah untuk pelaksanaan spesifik SPA, ganti rugi akibat pemungkiran kontrak dan kos. Hakim Mahkamah Tinggi memutuskan bahawa responden telah menunaikan peranannya dalam perjanjian itu sebelum tarikh penyelesaian sementara perayu gagal menunaikan peranannya, dan mengeluarkan suatu perintah untuk pelaksanaan spesifik bagi pihak responden. Perayu, oleh itu, merayu terhadap keputusan itu.

Diputuskan (menolak rayuan)
Oleh Zaleha Zahari HMR menyampaikan penghakiman mahkamah:

(1) Perayu dengan jelas melalui kl. 5 SPA bersetuju bahawa pembayaran penuh dianggap akan dibuat selepas deposit jumlah kebezaan dan sesuatu akujanji dibuat, yang menentang

penerimaan betul baki penuh berjumlah RM378,000. Pembayaran di bawah kl. 5, oleh itu, ialah sesuatu kombinasi deposit jumlah kebezaan dan akujanji pembiaya dibuat dan perayu menerima jumlah kebezaan sebanyak RM78,000. Perayu telah sewajarnya bersetuju bahawa, sebelum 24 Oktober 1990, ia akan menerima pembayaran separa (RM78,000) dan satu janji untuk melepaskan jumlah pinjaman dari pembiaya. Fakta bahawa pembiaya akan mengeluarkan satu akujanji, dan bukan mengeluarkan pinjaman penuh langsung, menandakan bahawa terdapat syarat-syarat yang perlu dipenuhi sebelum jumlah pinjaman boleh dilepaskan. Hakim perbicaraan tidak khilaf mengambil dalam pertimbangan amalan-amalan perbankan dan pemindahan hak yang digunakan oleh peguamcara berhubungan dengan transaksi macam ini. Klausa 5 SPA telah menyatakan dengan jelas bahawa responden akan "... dianggap telah mematuhi dan memenuhi keperluan-keperluan kl. 3" (iaitu, melaksanakan pembayaran penuh) apabila "... jumlah kebezaan (iaitu, RM78,000) telah disimpan dengan peguamcara penjual dan peminjam atau peguamcaranya telah melanjutkan sesuatu akujanji ke penjual atau peguamcara penjual ..." Klausa 5 SPA tidak menyatakan bahawa peminjam harus menyediakan sesuatu akujanji tidak bersyarat, tetapi sesuatu akujanji peminjam. Hakim, oleh itu, betul apabila mendapat bahawa perayu tidak boleh membaca ke dalam kl. 5 sesuatu "Akujanji Tidak Bersyarat" dan memutuskan bahawa sesuatu akujanji bersyarat mencukupi dan bahawa, dalam halkeadaan kes ini, kl. 5 SPA telah dipatuhi.

Other source(s) referred to:
Judith Sihombing, *Malaysian Conveyancing*, vol 3, para 1364.1

For the appellant - Mark Foong; M/s Mark Foong & Co
For the respondent - Yau Wai Leong; M/s Chan & Assoc

Reported by Suresh Nathan

JUDGMENT

Zaleha Zahari JCA:

[1] On 13 March 2006 this appeal was dismissed with costs. Our reasons are as follows.

[2] Luwasa Malaysia Sdn. Bhd., the defendant in the court below (appellant in this appeal), is the original purchaser of an apartment known as No. 1002, Desa Kudalari, Kuala Lumpur ("the said apartment") which apartment is part of a building erected on lands held under a Master Title, Certificate of Title No. 7806 for Lot No. 140 and Geran No 3296 for Lot No. 278 all of Section 63 Town of Kuala Lumpur which lands at all material times were registered in the name of the developer of the master land, Tan & Tan Development Sdn. Bhd. ("the developer"). The appellant purchased the apartment from the developer *vide* agreement dated 8 October 1980 ("the Principal Agreement"). It is common ground that on the date of execution of the Principal Agreement no separate document of title in respect of the apartment had been issued by the relevant authorities. It is also not in issue that the appellant's rights, and interest in the apartment was subject to all charges created by the developer on the master titles (section 1.06(a) & (b) and section 7.04(a), (b) and (c)).

[3] By a loan agreement cum assignment dated 27 October 1981, in consideration of a loan granted by Malayan Banking Berhad, Jalan Tun Perak Branch ("the chargee bank") to the appellant, the appellant had assigned absolutely to the chargee bank all rights, title and interest, under the Principal Agreement .

[4] About nine years later the appellant sold the said apartment to the plaintiff, Ong Siew Oi @ Ng Siew Ooi, (respondent in this appeal) *vide* sale and purchase agreement dated 24 July 1990 ("the SPA") at a purchase price of RM420,000. The respondent paid RM42,000 as 10% deposit upon execution of the SPA. The balance purchase price of RM378,000 was payable as provided in cls. 3, 4 and 5 of the SPA which states as follows:

> 3. The balance of the Purchase Price for the said Property amounting to Malaysian Ringgit Three Hundred and Seventy Eight Thousand (M$378,000.00) only (hereinafter referred to as "the Balance Purchase Price") shall be deposited by the Purchaser with Messrs. P.G. Lim & Co., Advocates & Solicitors from Room 901-904, 9th Floor, Bangunan Lee Wah Bank, Medan Pasar, 50050 Kuala Lumpur (hereinafter called the vendor's solicitors) within three (3) months from the date of execution of this agreement (hereinafter referred to as "the completion date") who shall hold the same as stakeholders.

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4. The vendor's solicitors are hereby authorized by the vendor to utilize the balance of the purchase price to redeem the said Property from the Bank on behalf of the vendor so as to secure a valid Receipt and Reassignment of all that the Principal Agreement and all the estate right title interest benefit advantage property claim and demand whatsoever of the vendor in or to the same and the said Property comprised therein to the vendor free from all encumbrances and the balance of the purchase price after deducting the redemption sum paid to the Bank shall be released by the vendor's solicitors to the vendor once the Deed of Assignment to the purchaser has been perfected and delivered to the purchaser's solicitors and in any event not later than the completion date.

5. If the purchaser shall have obtained a loan from a licensed finance company or a bank (hereinafter referred to as "the Lender") and the differential sum between the balance purchase price and the loan having been deposited with the vendor's solicitors and the Lender or its solicitors have been extended and undertaking to the Vendor or the Vendor's solicitors on or before the completion date to pay the balance purchase price stated in clause 3 above shall be deemed to have complied with and satisfied the requirements of clause 3 above.

[5] Time was expressly made to be of the essence of the contract (cl. 18). The sale was conditional upon obtaining the consent of the developer. Parties acknowledged that the appellant was the beneficial owner of the apartment as the individual strata title has not been issued, and that the appellant had to redeem the apartment from the chargee bank.

[6] The respondent secured a loan of RM300,000 from the Malayan Banking Berhad, Jinjang Branch ("the respondent's financier") to finance the purchase. On 13 September 1990, Messrs Choong Yik Son & Robiha, (the respondent financier's solicitors), wrote to Messrs P.G Lim & Co, (the appellant's solicitors), informing them that the respondent had deposited with them RM78,000 the approval of the loan by the respondent's financier, and also notified them that the respondent's financier would be prepared to release the loan amount approved of RM300,000 upon certain undertakings and confirmation being furnished by the Master Chargee, the appellant and the developer ie,:

(a) A letter of release/disclaimer from the appellants' chargee to exclude the apartment from any foreclosure proceedings and to refund the loan sum on demand in the event that the receipt and reassignment cannot be perfected for any reason whatsoever;

(b) A letter of undertaking from the appellants to refund the loan sum on demand in the event that the deed of assignment in favour of the respondent cannot be perfected for any reason whatsoever and also to refund the same in the event that the memorandum of transfer cannot be registered in favour of the respondent upon issuance of the Strata Title thereof; and

(c) A letter of Consent from the Developer to the Deed of Assignment.

[7] The respondent's financier issued another letter on 15 October 1990 to the appellant's solicitors informing them that they undertook to release the approved loan sum of RM300,000 subject to the fulfillment of four conditions set out in para 3 before their undertaking can take effect ie,:

a) the purchaser/borrower has settled the difference between the purchase price and the loan sum;

b) the Vendor has forwarded us its undertaking to refund the loan sum on demand in the event the Deed of Assignment in favour of the Purchaser/Borrower cannot be perfected for any reason whatsoever and also to refund the loan sum to us on demand in the event the Memorandum of Transfer in favour of the Purchaser/Borrower cannot be registered for any reason whatsoever upon issuance of the individual strata title;

c) you have forwarded us the undertaking of the chargee of the Master Title to relinquish all their interest and rights to the property and will exclude the same from any foreclosure proceedings which may be taken against the Developer and to ensure that the alienated individual/strata title is forwarded to us upon issuance and free from encumbrances;

d) you have forwarded us the Developer's undertaking to deliver us the original issue document of the individual strata title upon issuance free from encumbrances and to further undertake to refund all monies released should the above cannot be fulfilled and should the transfer be rejected upon registration …

[8] The appellant was not prepared and did not comply with the undertaking requested in paras 3(b) and 3(d) of letter dated 15 October 1990 despite repeated reminders.

[9] The respondent financier's solicitors then, on 20 October 1990, issued to the appellant's solicitors a conditional undertaking from the respondent's financier to forward the loan sum of RM300,000 to the appellant or the appellant's solicitors, together with the respondent's cheque for RM78,000 (the difference between the balance of the purchase price and the approved loan) pursuant to cl. 5 of the SPA, as well as a copy of the respondent financier's letter of undertaking to the respondent's solicitors.

[10] The appellant's solicitors by their letter dated 22 October 1990 rejected the respondent's financiers undertaking and took the position that cl. 5 had not been complied with. The appellant however took steps to encash the respondent's cheque of RM78,000.

[11] Thereafter, on 8 November 1990, the appellant's solicitors issued a notice to the respondent financier's solicitors notifying them of the appellant's intention to terminate the SPA and to forfeit the deposit should the balance purchase price not be paid by 5pm the following day, 9 November 1990. The appellant subsequently, through their solicitors, on 4 December 1990, issued a notice to the respondent terminating the SPA, that a sum of RM42,000 would be forfeited, and that the sum of RM78,000 would be reimbursed to the respondent.

[12] On 23 November 1990 the respondent instituted proceedings against the appellant for an injunction restraining them from selling, transferring or assigning the apartment to any one other than the respondent, as well as an injunction to compel the appellant to deliver vacant possession of the said property to the respondent. The respondent also sought for an order for specific performance of the SPA, damages for breach of contract and costs.

The Judge's Findings

[13] At the High Court no oral evidence was adduced. The hearing proceeded on issues of law based on agreed facts, as well as agreed and non-agreed documents. The primary issue of law which the High Court was required to determine was:

... whether the conditional undertaking given by the Lender (Maybank Bhd) is sufficient for the purpose of Clause 5 of the Agreement.

[14] Clause 2 of the SPA was construed by the judge to mean that the sale was conditional upon obtaining the consent of the developer. The judge was of the view that the conditions imposed by the respondent's financier were reasonable and essential, and in accordance with banking practice as the strata title to the apartment had not been issued, by reason of the existence of an existing charge, and the fact that the purchase was to be free from all encumbrances.

[15] The judge's reading of the agreement as a whole, and cl. 5 in particular, permits payment of the balance purchase price through a loan from a financier. He was of the view that the court was required to take into account banking practice as well as conveyancing practice adopted by solicitors relating to such a transaction. Clause 5 provides that the respondent shall "... be deemed to have complied with and satisfied the requirements of cl. 3" (ie, effected full payment) when "... the differential sum (ie, RM78,000) had been deposited with the vendor's solicitors and the lender or its solicitors have extended an undertaking to the vendor or the vendor's solicitors ...". Clause 5 did not require the lender to provide an unconditional undertaking, but plainly a lender's undertaking. He then held that the appellant cannot read into cl. 5 an 'Unconditional Undertaking' and there was no reason to do so.

[16] In the circumstances of the present case he was of the view that the respondent's financier was entitled to impose the conditions which they did to protect their interest, and that the respondent could not be held responsible for her financier's action. The imposition of terms by them was beyond the respondent's control. Clause 4 would only operate upon cl. 5 being complied with. In these circumstances he concluded that the conditional undertaking sufficed, and that cl. 5 of the SPA had been complied with.

[17] In his written grounds the judge stated that his oral judgment of time being no longer of the essence was an oversight, but his conclusions remained intact.

[18] The judge's conclusion was that the respondent had fulfilled her part of the bargain before the completion date of 23 October 1990 and the appellant had failed to fulfill theirs. An order for specific performance of the SPA was then issued in favour of the respondent and he further awarded damages be assessed. The judge further made an order that the respondent is permitted to set-off the balance purchase price from the damages assessed.

The Submissions

[19] The appellant's counsel submitted that the judge did not give sufficient attention to cls. 3, 4 and 5, and had erred in finding that a conditional undertaking sufficed, that cl. 5 had been complied with, and in concluding that the respondent had fulfilled her obligations under the SPA. He submitted that the judge also erred in taking into consideration banking practice with regard to loan transaction and conveyancing practice of solicitors.

[20] He pointed out the loan sum of RM300,000 referred to in letter dated 15 October 1999 was part payment of the purchase price payable to the appellant. If this sum were to be paid by the respondent's financier, it would go to the appellant's bank to discharge the charge created by the appellant. The loan amount was not meant to be paid to the developer's bank to discharge the charge created by the developer on the master titles. The developer's bank is being asked to relinquish their rights and interests under the developer's charge on the master titles, both before and after, the issuance of individual title. He argued that it was unreasonable for the respondent's financier to require an undertaking from the developer's bank to relinquish their charge on the master titles because the developer's bank required such a charge to protect the loan it gave to the developer. He submitted that it was beyond the appellant's capacity to demand such an undertaking from the developer's bank and the respondent's financier was attempting to obtain an additional right which the respondent has not acquired under the deed of assignment. He was of the view that the respondent's financier was unreasonable in demanding that the appellants, or their solicitors, provide an undertaking from the developer to deliver an original issue document of title free from encumbrances.

[21] The developer was already bound under the Principal Agreement to deliver to the appellant (as the original purchaser), the original issue document of title free from encumbrances. The respondent would obtain this benefit upon execution of the Deed of Assignment of the Principal Agreement and upon payment of the purchase price. According to him this undertaking was unnecessary.

[22] In reply the respondent's counsel submitted that there was no ambiguity in cl. 5, and should there be any ambiguity as to the type of undertaking to be provided, it has to be interpreted by reference to commercial reality and business common sense. He submitted that the judge had not erred in referring to such a practice. In transactions involving financing and redemption of property without title issued, it is to be expected that an undertaking to release the loan sum by the lender bank is to be conditional upon a cross undertaking to disclaim the property and to refund, if the receipt and reassignment cannot be perfected. (*Malaysian Conveyancing* vol 3 by Judith Sihombing para 1364.1).

[23] The respondent counsel's submitted that the respondent, having placed the differential sum and the financier's undertaking, has no further tasks under the SPA. The appellant has the positive duty to act *bona fide*, reasonably and their best endeavours to fulfill the terms of the respondent financier's undertaking in order to perfect the respondent's performance. The conditions imposed were not onerous nor prejudicial to the appellant. The appellant has made no effort to make the request. The situation is not one where such a request was made and the bank concerned has refused despite such a request.

Decision

[24] Our views are as follows: The appellant had clearly by cl. 5 of the SPA agreed that full payment is deemed to be made upon depositing the differential sum and an undertaking, as opposed to actually receiving the full balance of RM378,000. Payment under cl. 5 was thus a combination of depositing the differential sum and the respondent financier's undertaking and the appellant accepting the differential sum of RM78,000. The appellant had accordingly agreed that, by 24 October 1990, it would receive a partial payment (RM78,000) and a promise to release the loan sum from the respondent's financier. The fact that respondent's financier

would be issuing an undertaking, instead of issuing the full loan sum directly, implies that there are necessarily conditions that have to be met before the loan sum can be released.

[25] I am in agreement with the respondent's counsel that the judge had not erred in taking into account banking practice as well as conveyancing practice adopted by solicitors relating to transaction such as this. I am also in agreement with the High Court Judge's interpretation of cl. 5. Clause 5 clearly states that the respondent shall "… be deemed to have complied with and satisfied the requirements of cl. 3" (ie, effected full payment) when "… the differential sum (ie, RM78,000) had been deposited with the vendor's solicitors and the lender or its solicitors have extended an undertaking to the vendor or the vendor's solicitors …" Clause 5 did not state that the lender is to provide an unconditional undertaking, but a lender's undertaking. The judge was therefore right in ruling that the appellant cannot read into cl. 5 an 'unconditional undertaking' and in concluding that a conditional undertaking sufficed, and in the circumstances of this case, that cl. 5 of the SPA had been complied with.

[26] For the reasons aforesaid the appeal was dismissed with costs. The deposit to respondent to account of taxed costs.